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No. 264

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In the Supreme Court of the United States

OCTOBER TERM, 1958

PAUL DE LUCIA, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 75-83) is not yet reported. The memorandum of the District Court (R. I, 325-336) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958 (Pet. 75). The petition for a writ of certiorari was filed on August 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a denaturalization proceeding, the district court's findings that naturalization had been procured by wilful misrepresentation and concealment of material facts were supported by the evidence.

2. Whether an order of naturalization is *res judicata* and not subject to attack for misrepresentation and concealment.

3. Whether the District Court improperly noted petitioner's failure to testify.

STATUTE INVOLVED

Section 340(a) of the Immigration and Naturalization Act of 1952 (66 Stat. 260), 8 U.S.C. 1451(a) provides in pertinent part:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *.

STATEMENT

On October 10, 1956, a complaint was filed in the United States District Court for the Northern District of Illinois, under Section 340(a) of the Immigration and Naturalization Act of 1952, to cancel a certificate of naturalization granted petitioner on September 27, 1928, on the grounds that it had been procured by concealment of material facts and wilful misrepresentation (R. I, 3-7). Following a trial before the court, a decree of denaturalization was entered on June 11, 1957 (R. I, 338-339). The Court of Appeals affirmed.

The complaint (R. I, 3-7), which was accompanied by an affidavit of the Regional Counsel of the Immigration Service (R. I, 8-10), alleged that petitioner had falsely stated under oath, in documents filed and testimony given preparatory to his naturalization, that his name was Paul Maglio; that he had been born in Apricena, Italy, on July 10, 1898; that his mother's name was Torelli Nunzia Marie; that he had arrived in the United States at New York on August 10, 1920 on the SS RYNDAM; and that he had never been arrested. The complaint alleged that, in truth and fact, petitioner's name was Felice De Lucia; that he had been born on November 14, 1897, in Naples, Italy; that his mother's name was Maria Annunziata; that he had been convicted of voluntary homicide in Naples in May, 1917; and that he had entered the United States unlawfully on August 12, 1920. The complaint asserted further that petitioner had falsely and fraudulently represented that he was Paul Maglio at the time of his arrival and in naturalization proceedings to conceal his

criminal record in Italy and to procure his naturalization in violation of law.[1]

1. Prior to trial, petitioner was called as a witness in an attempt to take his deposition pursuant to the Federal Rules of Civil Procedure. He stated that his name was Paul De Lucia and gave his address, but refused to answer any further question, stating that he did not want to be a witness against himself (R. I, 21-33, 23). The United States Attorney filed a motion to show cause why petitioner should not be held in contempt for his subsequent refusal to answer in compliance with an order of the court (R. I, 47-49). The court deferred a ruling on the motion until the conclusion of the trial (R. I, 63). After trial petitioner was adjudged guilty of contempt. The Court of Appeals reversed, holding that petitioner was entitled to rely upon his privilege under the Fifth Amendment (Pet. 85-88).

2. The evidence may be summarized briefly as follows:[2]

Petitioner was identified as Paul De Lucia by two United States District Court deputy clerks and a deputy marshal who witnessed petitioner's signature on court bonds and prison records (R. I, 213-217, 205-209). He was also identified as Paul De Lucia by a friend, Fish, who had witnessed his petition for naturalization (R. I, 74-77, R. II, 1).

The petition for naturalization witnessed by Fish, the preliminary form therefor and a declaration of intention were all made in the name of, and signed by "Paul Maglio", the applicant requesting that his name

[1] The affidavit filed with the complaint contained similar recitals (R. I, 8-10).

[2] The evidence is summarized in greater detail in the opinion of the District Court (R. I, 325-336).

be changed to "Paul De Lucia" (R. II, 1-8); a name which he represented he was then using because he "got married on that name" (R. I, 315). On these documents the applicant represented further, *inter alia*, that he had been born in Apricena, Italy on July 10, 1898; that his mother's maiden name was Nunzia Maria Torelli; that he was married January 3, 1927, and his wife's name was Nancy, born October 2, 1905 in Naples, Italy; and that he had never been arrested. The certificate of naturalization was granted in the name of, and signed by, "Paul De Lucia" on September 27, 1928 (R. II, 9). A handwriting expert, comparing the signatures of "Paul De Lucia" and "Paul Maglio" on all of the naturalization papers with the known signatures of petitioner, found them to have been written by the same person (R. I, 229).

The government then produced a witness who testified that his own name was Paul Maglio, that petitioner was not related to him in any way and that he had never seen petitioner before in his life (R. I, 131). The witness testified that he himself had been born in Apricena, Italy on July 10, 1898; that his mother's maiden name was Nunzia Maria Torelli; and that he had four sisters, Adele, Rosa, Angole and Alvire (R. I, 116-117). He identified photographs of his family and numerous foreign documents of his personal and family history (R. I, 119-131) including his passport which he testified was in the possession of a travel agency in Naples for a period prior to the time he left Italy for this country (R. I, 126-127). He stated that he had always lived in Apricena, Italy; except for a short period of military service, until his entry here, that the population was approximately 6,000, that in his occupation there as City Clerk and Registrar he had kept a record of all

births and deaths, and that there was no other "Maglio" family residing there and no Nunzia Maria Torelli other than his mother (R. I, 118-119). His testimony was corroborated by the testimony of his cousin, Alfonso Torelli (R. I, 136-140), and by Italian public records attesting that there was record of the birth of only one Paola Maglio in Apricena (R. I, 255).

The government further showed that Paul de Lucia had on bank and insurance records in this country represented that he was born, not in Apricena, but in Naples, Italy on November 14, 1897 (R. I, 163-194). On one of the records he listed his mother's maiden name as Maria Annunziata (R. I, 177). A handwriting expert found the signatures on these records to be those of petitioner (R. I, 229).

A marriage register in a Chicago church showed that Anthony and Mary Annunziata were listed as the parents of Paolo de Lucia of Naples, who was married on January 30, 1927 to Annunziata Gigante (the maiden name of Nancy De Lucia) (see R. I, 161).

In an interview with an F.B.I. agent in 1947, petitioner gave his sisters' names as Emily, Anna, Clementine and Louise (R. I, 143).

The government proved further, by documentary evidence, that one Felice De Lucia was born in Naples, Italy, on November 14, 1897, the son of Antonio and Maria Annunziata (R. II, 11). Felice had four sisters, Emilia, Anna, Clementina and Luisa (R. II, 15). Felice De Lucia was convicted in Italy of voluntary homicide in 1917 (R. II, 18) and again, *in absentia*, in 1924, for voluntary homicide committed in 1920 (R. II, 26).

The District Court in its memorandum, constituting "Findings of Fact and Conclusions of Law", found that petitioner was the Paul De Lucia who used the

name Paul Maglio upon entry here and upon application for naturalization granted in September 1928; that petitioner was not Paul Maglio, that he had falsely assumed this identity to enter this country, and that in representing himself to be Paul Maglio in applying for naturalization, he had committed perjury and a fraud on the court; and that Paul De Lucia was, in truth and fact, Felice De Lucia. The court held that the use by petitioner of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts, vitiated the certificate of citizenship granted to him (R. I, 325-336).

ARGUMENT

At the outset, we point out that the Court of Appeals has reversed petitioner's conviction for contempt in refusing to answer questions asked during a pretrial deposition (Pet. 85-86) and the government has not petitioned for certiorari in that case. Petitioner's argument with respect to the abuse of the Federal Rules of Civil Procedure is, therefore, not properly before this Court.

1. Much of the remainder of petitioner's prolix argument is a series of disjointed attacks on the court's findings of fact and its conclusions of law.[3]

[3] He makes general assertions, for example, that the evidence is insufficient to support the findings and the findings insufficient to support the decree (Pet. 30); that it is impossible to ascertain either the underlying facts upon which the District Court relied or the findings upon which the Court of Appeals affirmed (Pet. 32); that the District Court made immaterial findings which confused the issue (Pet. 35, 36) and findings contrary to facts (Pet. 57); that the Court of Appeals failed to re-examine the findings and improperly added findings of its own (Pet. 51, 54); and that the District Court's conclusions of law were not applicable to his case (Pet. 55, 59).

The record, however, leaves no doubt that the government met the strict burden of proof required in a denaturalization proceeding. The evidence is clear, unequivocal, and convincing. *Schneiderman* v. *United States*, 320 U.S. 118; *Knauer* v. *United States*, 328 U.S. 654; *Klapprott* v. *United States*, 335 U.S. 601. The government proved that petitioner is the same Paul De Lucia who, in applying for entry and naturalization, asserted that his true name was Paul Maglio and that he had never been convicted of crime. It established conclusively, by testimony and documentary evidence, that another man is in fact Paul Maglio. The government also established, by petitioner's representations on previous church records, and on bank and insurance records made subsequent to this naturalization, that his birth date, birth place and family history were identical in all respects to that of Felice De Lucia, who was shown to have been convicted of crime. The evidence further showed, in corroborative detail, the opportunity which petitioner had to effect his entry using Paul Maglio's identity and the scheme which he employed in asking, at the time of naturalization, that his name be changed to Paul De Lucia, so that any inconsistencies in identity arising because of his marriage record or otherwise would be obscured.

This evidence was considered by the District Court at length, in an organized and comprehensive fashion with the relevant evidence summarized in support of each specific finding of fact. The court found that petitioner was the "Paul De Lucia" who had falsely assumed the identity of "Paul Maglio" for purposes of entry and naturalization and that petitioner was in fact "Felice De Lucia" who had a criminal record. It held that the assumed name, the concealment of true iden-

tity and "other material facts" were grounds for denaturalization. In the light of its findings and the case law it relied upon to reach its conclusions, it is obvious, as the Court of Appeals observed, that these "other material facts" had reference to petitioner's criminal record.

The Court of Appeals examined the record and found the district court's findings to be fully supported by the evidence and its conclusions of law amply supported by the federal cases.

These conclusions of both courts below are required by logic and law. Both courts pointed out that the use of an assumed name to gain entry into the United States may be grounds for deportation. *Landon* v. *Clarke*, 239 F. 2d 631 (C.A. 1). And, obviously use of an assumed identity in applying for naturalization thwarts the very purpose for which an application is required.

The courts noted further that concealment of a criminal record is grounds for refusing or cancelling naturalization. *United States* v. *Montalbano*, 236 F. 2d 737 (C.A. 3), certiorari denied, 352 U.S. 952; *Corrado* v. *United States*, 227 F. 2d 780 (C.A. 6), certiorari denied, 351 U.S. 925; *United States* v. *Accardo*, 298 F. 2d 632 (C.A. 3), certiorari denied, 347 U.S. 952; *Stevens* v. *United States*, 190 F. 2d 880 (C.A. 7); *United States* v. *Ascher*, 147 F. 2d 541 (C.A. 2), certiorari denied, 325 U.S. 884. Petitioner is not helped at all in this respect by his reliance on *United States* v. *Minerich*, 250 F. 2d 721, where this same circuit held that concealment was not proved by showing the failure of an applicant to volunteer information as to a criminal arrest and conviction occurring some seven

teen days before he was sworn to citizenship and after the preliminary investigation. In the instant case, petitioner not only hindered investigation initially by his concealment; he made a positive false assertion that he had never been arrested.

It is clear here that petitioner's naturalization decree was based upon both wilful misrepresentation and concealment of material facts within the plain meaning of the applicable statute. Petitioner's concern with the distinction between "fraud" and "illegal procurement" under the previous statute is immaterial. There is no question here of mere illegality. The government proved wilful misrepresentation and concealment of material facts, or, in the terminology of the prior statute, "fraud".

2. There is therefore no merit to petitioner's assertion that his order of naturalization is *res judicata* even though it was obtained by misrepresentation and concealment of material facts. The very decision which he cites in support of this theory is conclusive authority for the fact that Congress has the power to provide for the revocation of naturalization on the ground of fraud. *Knauer v. United States*, 328 U.S. 654, 673.

3. Petitioner contends that the District Court "erroneously threw into the scales" an inference of guilt against him for having availed himself of the protection of the Fifth Amendment in his pretrial deposition (Pet. 62). The record shows, however, that the court's findings were based strictly upon the documented evidence. This is consistent with its pre-trial ruling (R. I. 51) that the government must meet the positive and affirmative burden of proving its case "beyond a reasonable doubt". This the government did. While noting petitioner's failure to testify at

the pre-trial deposition in its preliminary statement of the case (R. I, 325), the only subsequent reference made by the trial court to petitioner's silence dealt with petitioner's failure to testify at the trial itself, and all that the court said as to this was that petitioner's "failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain the government's evidence" (R. I, 334). This is equivalent to saying that the government's case stood unrebutted. See *Holland* v. *United States*, 348 U.S. 121.[1] Thus, there was no unjustified reliance on petitioner's failure to testify.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] This Court there said, of a criminal case, 348 U.S. at p. 138-139: "Once the government has established its case, the defendant remains quiet at his peril."

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